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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| FREDDY J. ROBLEDO,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RANDSTAD US, L.P.,<br><br>Defendant and Appellant. | H045055<br>(Monterey County<br>Super. Ct. No. M130588) |

This is the second appeal arising from an employment dispute involving plaintiff Freddy J. Robledo and his employer, defendant Randstad US, L.P. In the first appeal (*Robledo v. Randstad US, L.P.*, (Oct. 26, 2016, H042483), [nonpub. opn.]) we affirmed the superior court's order denying defendant's motion to compel arbitration in an action brought by plaintiff under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code 2698, et seq.) Defendant now contends that plaintiff was bound by a "post-dispute" agreement, identical to the one invalidated in the first action, under which he was obligated to submit employment-related claims to arbitration and would not bring any claim on behalf of other individuals. We will affirm the second order denying defendant's motion.

*Background*

We recount the underlying factual history as summarized in our 2016 opinion. Defendant is a Georgia corporation that offers human resources services, such as staffing, to its clients throughout the country, including California. From April 10 through May

31, 2014, plaintiff worked as a temporary employee for one of defendant's clients; then he was hired directly by the client as a permanent employee.

Each applicant for employment at defendant's Salinas branch was given an application packet, which included a two-page arbitration agreement. The agreement provided, in relevant part: "As consideration for accepting or continuing my employment with Randstad, Randstad and I agree to use binding arbitration, instead of going to court, for any 'covered claims' that arise between me and Randstad . . . 'Covered claims' are any legal claims that relate to my recruitment, hire, employment, and/or termination including, but not limited to, those concerning wages or compensation, consumer reports, benefits, contracts, discrimination, harassment, retaliation, leaves of absence or accommodation for a disability. [¶] . . . *I also agree that covered claims will only* [*sic*] *be arbitrated on an individual basis,* and that both Randstad and I waive the right to participate in or receive money from any class, collective or representative proceeding. *I may not bring a claim on behalf of other individuals,* and any arbitrator hearing my claim may not combine more than one individual's claim or claims into a single case, or arbitrate any form of a class, collective, or representative proceeding. I understand and agree that any ruling by an arbitrator combining the covered claims of two or more employees or allowing class, collective or representative arbitration would be contrary to the intent of this agreement and would be subject to immediate judicial review. [¶] . . . [¶] I agree that this entire agreement is void if it is determined that I cannot waive the right to participate in or receive money from any class collective, or representative proceeding."

Plaintiff spoke both Spanish and English, but his ability to read and write in either language was limited, and his schooling had ended at the ninth grade. When he was hired on April 9, 2014, he was given a large stack of papers and told he must sign them in order to be employed by defendant. He did not understand many of the documents, and no one explained any of them before he signed. In particular, he was unaware that he was

signing an arbitration agreement, nor did he understand what an arbitration agreement was. No one explained the existence and nature of this agreement to him.

On January 7, 2015, plaintiff filed a complaint asserting a single cause of action under Labor Code section 2698, et seq., the "Private Attorneys General Act of 2004," often referred to as "PAGA." Plaintiff alleged that defendant had violated several provisions of the Labor Code by failing to provide plaintiff and other employees with meal and rest periods, failing to pay overtime wages, failing to pay at least minimum wage, failing to provide accurate wage statements, failing to pay employees for all hours they worked, and failing to keep accurate personal and work records for each worker.

One week later, plaintiff was told to appear at the Salinas branch office to update his contact information, as a condition of further employment. When he arrived, he was directed to sign two more stacks of papers; again he was not informed, and he did not understand, that he was signing an arbitration agreement or that he was waiving "representative civil claims" against defendant.

On March 2, 2015, defendant moved to compel arbitration, invoking the provisions of both the initial arbitration agreement plaintiff had signed and the one on January 14, 2015. Defendant argued that the agreements were enforceable under the Federal Arbitration Act (FAA), which preempted any state authority holding otherwise. Although our Supreme Court had held otherwise in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), defendant maintained that *Iskanian* was wrongly decided and should not control.

On May 7, 2015, the superior court denied defendant's motion to compel arbitration with respect to the first agreement, reasoning that "clearly, under the current State Supreme Court's pronouncement [in *Iskanian*], it can't be enforced." The court declined to rule on the second agreement until the parties could obtain discovery regarding "Defendant's knowledge of plaintiff's claims at the time it requested Plaintiff

to update his records and on the circumstances surrounding Plaintiff's execution of the second agreement."[1] Defendant appealed from that order.

This court affirmed the May 2015 order on October 26, 2016. We rejected defendant's express invitation to disregard *Iskanian* and held that the April 2014 waiver of the right to bring a PAGA suit was unenforceable as against public policy.

At the renewed hearing before a different superior court judge on June 28, 2017, defendant argued that the second (January 2015) agreement should be enforced because it consisted of a valid "post-dispute" waiver approved by *Iskanian*. Anticipating a potential inference of fraud, defendant emphasized that its evidence demonstrated that the local representatives who had presented the second agreement to plaintiff "had absolutely no knowledge of Mr. Robledo's case" when they asked him to sign the second agreement. Plaintiff agreed that defendant's representatives "certainly didn't bring him in there to accomplish a post-dispute arbitration agreement" and that "nobody knew they were signing . . . a post-dispute arbitration agreement." Defendant, however, insisted that "certainly Mr. Robledo knew, or certainly should have known, when he signed the arbitration agreement on January 14th, that one week [earlier] he had filed a suit against Randstad."

In its written order on July 21, 2017 the superior court gave two reasons for its ruling on the second agreement. First, it used the same rationale as in the first agreement: that plaintiff could not be required to waive the right to pursue a PAGA claim, and the entire agreement therefore was deemed void under the terms of the agreement. Second, the court found that "neither party intended to enter into a post-litigation arbitration agreement" when the second agreement was presented to plaintiff; consequently,

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[1] The court's concern in delaying its ruling on the second agreement pending discovery was "really whether the employer knew that this claim was pending and slipped past counsel and got the employee to sign it. That is a tremendous concern to me."

defendant could not "circumvent the holding of [*Iskanian*]." Defendant then filed this timely appeal.

*Discussion*

On appeal, the parties debate several points, all related to the issue of whether the second agreement contains a valid post-dispute waiver of a representative action. "Where, as here, the issues presented by a petition to compel arbitration involve only the interpretation of an arbitration agreement, and there are no factual disputes concerning the language of the agreement or its formation, a reviewing court determines the scope and enforceability of the agreement de novo." (*Saheli v. White Memorial Medical Center* (2018) 21 Cal.App.5th 308, 316 (*Saheli*).)

Defendant makes much of the trial court's observation that the first agreement had been deemed unenforceable; it strenuously objects to what it believes was the trial court's erroneous reliance on the first agreement to invalidate the second. In its briefs it provides extensive analysis to convince us that the triggering of the "poison pill" provision in the first agreement does not determine the outcome of the provision in the second. We need not entertain this theoretical discussion, as we agree that the second agreement stands or falls on its own. Moreover, the trial court did not rule otherwise; it merely stated that the same provisions in the two agreements should incur the same result.

Defendant repeatedly insists that plaintiff must be compelled to "arbitrate his PAGA claim on an individual basis." A PAGA suit, however, is by definition a representative action. (*Iskanian, supra,* 59 Cal.4th at p. 387; see also *Julian v. Glenair, Inc*. (2017) 17 Cal.App.5th 853, 866, fn. 6 (*Julian*) [noting two senses in which *Iskanian* described PAGA claims as representative].) Plaintiff did not make an individual claim of Labor Code violations in his complaint, but brought only this single PAGA cause of action. And even if plaintiff were seeking remedies for himself as an individual, his PAGA claim still could not be arbitrated without the state's consent. (Cf. *Tanguilig v. Bloomingdale's, Inc*. (2016) 5 Cal.App.5th 665, 678-680 [even if an individual PAGA

cause of action is cognizable the state nevertheless is the real party in interest, and the right to litigate it in court cannot be waived without the state's consent].

Defendant primarily asserts that because the second agreement was *signed* after the dispute arose, the PAGA waiver necessarily "*is* enforceable"; any conclusion to the contrary "would eviscerate *Iskanian*'*s* pre-dispute/post-dispute distinction." Defendant further decries the court's "misapplication of California law" by its "focus on the parties' supposed subjective intent." In defendant's view, only objective manifestations of intent are meaningful, as "parties are deemed to accept the terms of contracts they sign." Here, because both parties signed the second agreement, "there is no dispute that the parties objectively intended to be bound" by it. Consequently, by signing the agreement with the awareness that he had filed suit a week earlier, plaintiff was "objectively binding" himself to its arbitration terms. Any conclusion to the contrary, it adds, "would be squarely preempted" by the Federal Arbitration Act (FAA), which "indisputably applies here."

Defendant's position rests on an illogical analysis to reach the preemption conclusion we rejected in its first appeal. More importantly, it relies on a misrepresentation of contract principles. It is not the law that a party's signature automatically and invariably signifies assent to the terms of the document. "It is axiomatic that contract interpretation is governed by the contracting parties' intent. 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' [Citations.]" (*Cotran v. Rollins Hudig Hall Intern., Inc.* (1998) 17 Cal.4th 93, 112, quoting Civ. Code, § 1636.)

Nor is it true that a contract clear and unambiguous on its face necessarily is enforceable, as there may be a latent ambiguity in its terms. "An ambiguity may appear on the face of a contract, or extrinsic evidence may reveal a latent ambiguity." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114 (*Fremont*

*Indemnity*).) Accordingly, "[a] court cannot determine based on only the four corners of a document, without provisionally considering any extrinsic evidence offered by the parties, that the meaning of the document is clear and unambiguous. . . . Instead, a court must provisionally consider extrinsic evidence offered by the parties." (*Ibid*.) "A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage & Rigging Co*. (1968) 69 Cal.2d 33, 37.)

Thus, " '[i]n ascertaining the intent of the parties, the court may resort to extrinsic evidence not only to resolve a facial ambiguity but to determine the existence of and resolve a latent ambiguity. [Citations.] An ambiguity is latent if the resort to extrinsic evidence reveals that what appears to be perfectly clear language is in fact susceptible of more than one reasonable interpretation. [Citations.]' . . . ' "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning [of] which the language of the instrument is reasonably susceptible." ' [Citation.]" (*Zissler v. Saville* (2018) 29 Cal.App.5th 630, 644.)

The agreement at issue, like the one before it, confines the resolution of an employee's workplace grievances to arbitration, and that forum could be used for only individual claims, not representative claims. Does that promise to use arbitration as "the only forum for resolving covered claims"[2] withstand the restrictions defined by *Iskanian*?

[2] As noted earlier, the agreement defines "covered claims" as "any legal claims that relate to my recruitment, hire, employment, and/or termination including, but not limited to, those concerning wages or compensation, consumer reports, benefits,

In light of the undisputed evidence of the parties' understanding, we cannot find that it does.

The second agreement does not say that the promise to arbitrate applies to preexisting claims, much less preexisting PAGA claims that may be deemed unenforceable under *Iskanian*; the document does not even acknowledge the existence of the PAGA claim, much less address it. Accordingly, a reasonable interpretation of the language makes it exclusively forward-looking.[3] The extrinsic evidence of the parties' intent was therefore admissible to explain the meaning of the agreement to arbitrate "any legal claims that relate to my employment."[4]

If defendant's Salinas representatives were unaware of the second agreement, as they stated in their declarations,[5] it cannot be said that both parties manifested the "common intent" through this document to permit arbitration of the *preexisting* dispute over employment conditions. There is no evidence that the parties understood this agreement to apply to the ongoing litigation in court. Plaintiff's declaration established that in January 2015 he was told that he was required to come in to renew his

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contracts, discrimination, harassment, retaliation, leaves of absence or accommodation for a disability."

[3] It is noteworthy that the disputed provision states, "I may not bring a claim on behalf of other individuals . . .," thus suggesting an anticipatory condition; it does not add, "or maintain an existing action . . . ."

[4] Because there is no conflicting evidence regarding the intent of the parties when the second agreement was requested by defendant and signed by plaintiff, we independently determine whether the evidence reveals a latent ambiguity in the contract terms. (*Rancho Pauma Mutual Water Co. v. Yuima Municipal Water Dist.* (2015) 239 Cal.App.4th 109, 119; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 22.)

[5] Judy Leal, manager of defendant's Salinas branch since January 2013, and Rogelio Zamudio, recruiter at the same branch, both submitted declarations stating that when plaintiff came in to update his paperwork they "did not have knowledge of any wage and hour dispute or lawsuit between Mr. Robledo and Randstad." Nor had either been instructed by anyone outside the branch to obtain another executed arbitration agreement from plaintiff at that time.

employment status by updating his contact information. He was given two stacks of papers to sign; he did not know why he had to fill out another application packet or what all the papers meant. According to plaintiff, "I was only informed that I must sign them if I wanted to continue working for [Randstad]." Given this uncontradicted evidence that neither plaintiff nor the Randstad agents in Salinas intended the promise to arbitrate to apply to the existing action, the superior court properly found that the second waiver of PAGA claims was again precluded.

*Iskanian* does not instruct otherwise. Defendant extracts dicta from the high court's acknowledgement that "[o]f course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations." (*Iskanian*, *supra*, 59 Cal.4th at p. 383.) The operative word there is "choice." The Court did add, "But it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises."[6] The high court did not hold, however—or even suggest—that every PAGA action *must* be deemed retroactively waived simply because it was initiated before a new arbitration agreement was imposed on the employee in order to continue his or her employment. To the contrary in *Iskanian* is the Court's citation of *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83 (*Armendariz*) for the principle that statutory requirements for the benefit of the employee "would generally not apply in situations in which an employer and an employee *knowingly and voluntarily* enter into an arbitration agreement after a dispute has arisen. In those cases, employees are free to determine what trade-offs between arbitral efficiency and formal procedural protections best safeguard their statutory rights. Absent such *freely negotiated* agreements, it is for the courts to ensure that the arbitration forum imposed on an

[6] It is worth noting that the court's reference to choice was to the freedom to choose whether to *bring* a PAGA action in court, not to abandon an existing one.

employee is sufficient to vindicate his or her [statutory] rights." (*Armendariz, supra,* at p. 103, fn. 8, italics added.) As we have concluded, there is no evidence in this case that the second agreement was freely negotiated, nor that in signing it plaintiff knowingly and voluntarily relinquished his right to litigate his preexisting representative action.

None of the appellate decisions cited by defendant stands for the proposition that the "voluntary postdispute waiver exception" must be applied to any situation involving an agreement signed after a PAGA action has been filed. All merely acknowledge the possibility that circumstances may exist in which the waiver can be deemed valid. (See, e.g., *Saheli, supra,* 21 Cal.App.5th at p. 317, fn. 4 ["an individual may agree to arbitrate such claims after a dispute has arisen"]; see also *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 648 [rejecting application of the waiver exception in the circumstances presented].) Defendant's reliance on *Julian, supra,* 17 Cal.App.5th 853 is likewise unavailing. In that case the appellate court determined the disputed agreement to consist of an unenforceable *predispute* waiver, because the employee-plaintiffs had not yet satisfied the statutory requirements authorizing them to bring the PAGA action. The *Julian* court did not hold that any postdispute waiver is necessarily enforceable without examining the facts under which it was executed.

Defendant cannot avoid the "poison pill" provision in the second agreement that renders the entire agreement void if the representative PAGA waiver is determined to be unenforceable.[7] Indeed, defendant makes only a weak effort to suggest otherwise: It refutes any suggestion that this term is ambiguous (an argument with which we agree); it makes the unremarkable point that the provision in the *first* agreement is independent of the provision in the second; and it makes the equally irrelevant point that if the waiver

[7] This provision states: "I agree that this entire agreement is void if it is determined that I cannot waive the right to participate in or receive money from any class, collective, or representative proceeding. Otherwise, the remainder of this Agreement will be enforceable if any other provision is found to be unenforceable."

in the second agreement is enforceable, then the "poison pill" provision "simply is not triggered."

In short, nothing on this record or in the terms of the agreement itself suggests any intent to apply the waiver to the litigation in progress. The record contains no evidence that the waiver condition was anything but forward-looking, as it was in the first, pre-employment agreement. Thus, notwithstanding defendant's questionable theory that a PAGA waiver is generally enforceable if it happens to have been made after a dispute arises, the circumstances presented here do not justify its application here, because it is obvious that the meaning (and therefore enforceability) of promises made in the document at issue are not independent of the parties' understanding and conduct. We therefore agree with the superior court that in this case, the circumstances surrounding the signing of the second agreement do not evince any mutual assent to forgo further judicial resolution of the PAGA claim already in progress. Defendant's attempt to circumvent the public policy embraced in *Iskanian* cannot succeed.[8]

*Disposition*

The order is affirmed. Plaintiff is again entitled to his costs in this appeal.

[8] In light of this conclusion, it is unnecessary to address defendant's extensive efforts to counter any suggestion of fraud, mutual mistake, or unconscionability in the transaction. As the result in this case is determined by the more fundamental ground of lack of mutual assent to the condition invoked by defendant, we need not address its argument in defense of its conduct.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

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